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No. 85-928

In the Supreme Court of the United States

OCTOBER TERM, 1985

INSURANCE COMPANY OF NORTH AMERICA, ET AL.,
PETITIONER,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Statement of the Case

The Petition for Writ of Certiorari under consideration concerns an action in subrogation brought by a marine cargo insurer. The case arises as a result of a loss of cargo sustained by the petitioner-plaintiff's insured. After payment to its insured, the present suit was brought against the carrier.[1]

[1] The carrier is the respondent-defendant. Pursuant to Supreme Court Rule 28.1 it is stated that respondent, Puerto Rico Marine Management, Inc., is a wholly owned subsidiary of the Puerto Rico Maritime Shipping Authority, a public corporation and instrumentality of the government of the Commonwealth of Puerto Rico. *See* 23 Laws of Puerto Rico Annotated Secs. 3051-3073.

The bill of lading under which the cargo in question was carried expressly incorporated the terms of the Carriage of Goods by Sea Act, 46 U.S.C. Secs. 1300-1315, and incorporated the terms of a long form bill of lading on file with the Federal Maritime Commission. Both the Carriage of Goods by Sea Act (in its section 3(3), 46 U.S.C. Sec. 1303(3)) and the long form bill of lading (in its items numbers 1 and 22, *see* 768 F.2d at 470) expressly provide for a one year time-for-suit provision. Because the alleged misdelivery in this case occurred on January 4, 1982, and suit was not filed until December 1, 1983, the defendant carrier moved to have the action dismissed by the District Court on the grounds that the same was time-barred.

Both the District Court, at 599 F. Supp. 199 (D.P.R. 1984), and the Court of Appeals for the First Circuit, at 768 F.2d 470 (1st Cir. 1985), held that the insurer's claim was time-barred.

Reasons for Denying the Writ

There are two reasons why the writ should be denied.

First, there is *no* disagreement among the Circuit Courts with respect to the question of whether it is the Harter Act or the Carriage of Goods by Sea Act which governs a cargo claim for loss of cargo occurring after a completed voyage.

Second, irrespective of whether or not it is the Carriage of Goods by Sea Act or the Harter Act which applies to the facts of this case, a decision on this point does not materially affect the outcome of this case.

Argument

I. THERE IS NO CONFLICT OF AUTHORITY AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

As was discussed by the Circuit Court below, 768 F.2d at 473, the Carriage of Goods by Sea Act (hereinafter "COGSA") applies of its own force only "[t]o or from parts of the United States in foreign trade. . . ." 46 U.S.C. Secs. 1300, 1312. It

does not apply of its own force to cargo carried from Elizabeth, New Jersey to San Juan, Puerto Rico as these are not properly ports in foreign commerce.

COGSA does provide, however, that it can be made applicable to ocean carriage between ports of the United States whenever a bill of lading, or other similar document of title, expressly states that the terms of the Act apply to such transportation. In this respect 46 U.S.C. Sec. 1312 provides:

> This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, *that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter:* Provided further, that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter. (Emphasis supplied).

There is no dispute that the bills of lading here in question expressly incorporated the terms of COGSA and made them fully applicable. *See* 768 F.2d at 475, fn. 7.

In requesting this Court to issue a Writ of Certiorari the petitioner contends that after cargo has been discharged from a vessel the terms and conditions of COGSA—and consequently the COGSA time-for-suit provision—cease to apply. For this the petitioner relies on 46 U.S.C. Sec. 1311 which provides:

> Nothing in this chapter shall be construed as superseding any part of sections 190-196 of this title [Harter Act], or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Insofar as the alleged loss of cargo in the present case occurred after the same was discharged from the ship, the petitioner argues that, on the basis of section 1311 quoted above, the Harter Act, 46 U.S.C. Secs. 190-196, and not COGSA apply in determining whether the claim was time-barred.

The petitioner further argues that there is Circuit Court authority which sustains the proposition that where the loss occurs prior to or after discharge of the cargo from the vessel, COGSA does not apply and it is the Harter Act which controls for statute of limitations purposes. This case is *Allstate Insurance Company* v. *International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983), and the petitioner contends its holding is in direct conflict with the Court of Appeal's decision below in the present matter.

There are two reasons why petitioner's argument in favor of the granting of the writ of certiorari is without merit. First, although COGSA does *not* apply in the first instance to the period after the discharge of cargo from a vessel, it *can* apply after discharge if the bill of lading specifically extends the period of coverage. In this respect 46 U.S.C. Sec. 1307 provides that:

> Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and *subsequent to the discharge from the ship* on which the goods are carried by sea. (Emphasis is supplied).

Therefore, the law in this respect is very clear that COGSA *can* be incorporated to apply to shipments not in foreign commerce, and that it *can* be incorporated into a bill of lading so as to apply to the period prior to loading and after discharge. This is all logically thought out and it is a specific part of the statute.

Second, the Eleventh Circuit decision in the *Allstate Insurance* case is easily distinguishable and presents no real conflict with the Court of Appeals decision in this case. While COGSA can apply to the period prior to and after discharge, *see* discussion above, the bill of lading must specifically say so. *See* 46 U.S.C. Sec. 1307, quoted above.

There is no indication whatsoever that the bill of lading the Eleventh Circuit had before it in the *Allstate Insurance* case had any language extending coverage of the Act to the period prior to loading and after discharge of cargo. In direct contrast to that situation, the bill of lading here in issue *expressly* and *unequivocally* extended its scope to the time period after discharge. It is, therefore, entirely logical that two different sets of facts will produce two different results. Properly read from this perspective, each Circuit Court decision is consistent with each other. In the Eleventh Circuit case COGSA could not apply to a loss to cargo occurring prior to loading because the bill of lading did not specifically extend the Act to this period of time. In the First Circuit case at issue here COGSA can and does apply because the bill of lading has specifically incorporated the terms of the Act to the period after discharge.

The above is an elementary principle of cargo claims law and this case presents no strong reason why any aspect of this state of law should be the subject of review by this Court.

II. The Granting of the Writ Would Not Materially Benefit the Petitioner's Case or Advance the Litigation

The lower courts in this case dismissed the petitioner's complaint because it was time-barred. As stated earlier, the long and short form bills of lading here in question incorporated COGSA, and, COGSA provides for a one year time-for-suit provision.

In the lower courts the petitioner argued that its claim was not governed by a one year limitations but by the concept of laches and, therefore, suit must have been filed within a "reasonable" period of time. The petitioner's reasoning was that, insofar as COGSA does not apply to the period after discharge, it is the Harter Act which controls and the Harter Act contains no statute of limitations.

Even supposing, however, that there were some way that petitioner's COGSA-or-Harter Act argument could succeed, this could not materially assist petitioner's time-bar argument and this fact strongly counsels against granting the writ of certiorari.

Assuming, *arguendo*, that a cargo claim involving a loss of cargo occurring after discharge could in no way be governed by COGSA, it is difficult to perceive that petitioner could nevertheless overcome a limitations defense. It is clear that in a non-COGSA (Harter Act) situation laches would control. Under the doctrine of laches, however, courts look to time periods contained in statutes (federal or local) which deal with analogous situations. *See e.g. Cities Service Oil Co.* v. *Puerto Rico Lighterage Co.*, 305 F.2d 170, 171 (1st Cir. 1962). In the present case the analogous statute would be COGSA (which provides for one year) and the Puerto Rico Commercial Code, 10 Laws of Puerto Rico Annotated at Section 1910 (also providing a one year time limitation).

Since the plaintiff waited nearly two years to file its action against the carrier, a decision by this Honorable Court to the effect that the Harter Act, and not COGSA controlled, would still not assist the petitioner-plaintiff in overcoming a limitations defense and, thus, this Court's accepting review of the issue presented would not materially advance or benefit the plaintiff-petitioner's case in this litigation.

Conclusion

Congress has expressly and unequivocally allowed ocean carriers to extend and incorporate the provisions of COGSA to periods of time before loading and after discharge. No acceptable reason can be advanced in this case to warrant this Court to review this provision of the maritime commercial statute known as COGSA. There is neither a conflict or a tension between the Harter Act and COGSA, nor between the case law mentioned by the petitioner. When a carrier has specifically incorporated COGSA to apply before loading and after discharge it will apply. When the carrier has not extended COGSA in this manner, it will not apply. It is as simple as that.

WHEREFORE, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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